IN THE

Supreme Court of the United States

October Term, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondent desperately attempts to avoid the serious question which persuaded this Court to grant certiorari—and the lower courts and commentators to grant extensive consideration to this case *—by misconstruing the testimony. Respondent's brief (p. 6) incorrectly asserts that petitioner's maritime expert, Capt. Darrigan, merely stated that the rope should have been flaked out on the deck and that he did not testify that the use of only two men for the hauling and carrying operation here involved was unsafe because the task was a job for three or four men.

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* The District Court ruled both ways on the question (compare R 29, see also, R 32-R 33 with R 60-R 62) and took almost six months to decide the post-trial motion (R 57, R 62). An extensive opinion was written by the Court of Appeals (R 63-R 72) and the case drew immediate law review comment. *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Review 1180 (1966).

The District Court judge specifically stated:

> "plaintiff's expert testified that it was his opinion that the work ordered done was a three-four man job." (R 61)

The prevailing opinion in the Court of Appeals reviewed the record as follows:

> "There was expert evidence to the effect that 3 or 4 men rather than 2 were required to carry the line in order to constitute 'safe and prudent seamanship'." (R 63)

Petitioner's main brief contains five different quotations from Capt. Darrigan's testimony to that effect (Pet'rs. Br. pp. 3-4; citing R33, 34, 38, 42 and 53).

Respondent's attempt to avoid the important legal issue here presented and its attempt to besmirch the integrity of the maritime expert's testimony (Resp'ts Br. p. 11)—clearly a matter for jury resolution—exposes the absence of support for its legal position.

The basic legal question remains—does the fact that respondent's vessel contained a sufficient number of men *overall* exonerate it, as a matter of law, from unseaworthiness liability for a shortage of personnel for the particular job function at the time and place the task was performed?

This Court has expressly rejected the defense that overall adequacy or sufficiency of equipment aboard ship exonerates the ship owner from liability caused by failures in the particular equipment actually provided for the job function at the time and place of performance. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96 (1944). Respondent has totally failed to meet that authority or to establish any basis for the inapplicability of the beneficial and persuasive *Mahnich* doctrine to a situation involving insufficiency of personnel for the job function at hand.

Respondent's reliance on the Coast Guard Manning Regulations (46 U.S.C. § 222; 46 C.F.R. §§ 157.01-1 et seq.) is misplaced. These merely set forth minimum requirements for the overall ship. In no way do the Coast Guard Regulations seek to define the number of men regarded as sufficient for any one of the myriad particular tasks that arise during the daily operation of a vessel. They do not attempt to establish standards of seaworthiness or of sufficient manning for particular tasks or circumstances, as is obvious from a study of the Regulations themselves. See particularly, 46 C.F.R. §§ 157.15-1, 157.20-15(b). Whether a sufficient number of men have been provided for a specific job function must be determined upon the circumstances of each particular case.

It is a not infrequent occurrence that, notwithstanding compliance with the overall complement requirement of the Coast Guard, a ship is short-handed for a particular task or job function. Thus, in *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585 (2d Cir. 1962), although the vessel lost two wipers during the course of a long Pacific Ocean voyage, its crew complement still met the minimum Coast Guard manning scale. Nevertheless, when a crewman was injured on an oil spill, the Court specifically held that the alleged insufficiency of wipers assigned to the particular function of cleaning the engine room would establish unseaworthiness liability, even in the total absence of negligence (302 F. 2d at 587).

Any failure to meet the Coast Guard overall manning regulations does establish a presumption of fault in favor of the injured party. *The Denali*, 112 F. 2d 952 (9th Cir. 1940), cert. den. 311 U.S. 687. However, the converse does not apply, and the mere fact that the ship does have an overall complement of men aboard sufficient to meet the Coast Guard Regulations does not ipso facto establish seaworthiness or sufficient manning if a specific defect can be shown. See, *Texas Co.* v. *N.L.R.B.*, 120 F. 2d 186,

189-190 (9th Cir. 1941).* It is, of course, settled law that a defendant's compliance with a statutory or administrative standard does not prevent a finding by a jury or trier of facts that more was required in the particular circumstances at hand. See, *Restatement 2d, Torts*, § 288C (1965 ed.).

Respondent is in plain error when it suggests (Resp'ts Br., p. 8) that the use of a hammer to paint the deck could not give rise to unseaworthiness and that a vessel may not be held unseaworthy when an otherwise seaworthy piece of equipment is used improperly or for an unintended purpose. Numerous authorities contradict respondent's position.

In *Crumady* v. *The Joachim Hendrick Fisser*, 358 U.S. 423, 425, 427-8 (1959) a seaworthy winch was adjusted to a 6-ton instead of a 3-ton limit by working longshoremen, and unseaworthiness liability was attached there by this Court. In *Street* v. *Isthmian Lines, Inc.*, 313 F. 2d 35, 36 (2d Cir. 1963) cert. den. 375 U.S. 819, a seaman used a cold chisel instead of a hacksaw for a particular task, although a hacksaw was aboard ship in the tool shop. Unseaworthiness liability was found precisely because an otherwise seaworthy piece of equipment was attempted to be used in an improper manner and for an unintended purpose, with resultant injury, and the existance of the intended and proper tool elsewhere aboard ship was held no defense. In *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523-4 (1957) a ship's baker used a butcher knife instead of a scoop to remove ice cream and a jury verdict in his favor was upheld.** The additional ground

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* Reliance upon an overall Coast Guard certificate as an exoneration from liability arising out of a particular shipboard situation was also specifically rejected in *Murphy* v. *Overlakes Freight Corp.*, 177 F. 2d 342, 344 (2d Cir. 1949), cert. den. 339 U.S. 913 (1950).

** Although *Ferguson* was a Jones Act-negligence case, its rationale is clearly applicable to unseaworthiness claims, as was specifically held in *Street* (313 F. 2d at 38, fn. 3).

set forth by Judge Smith dissenting below—that the manner of handling of the manila line here involved was improper and gave rise to an unseaworthy condition (R71-R72)—has in no way been met by respondent's brief, although it is supported by the substantial authority above cited and cited in petitioner's main brief.

Respondent's shallow attempt to turn this case into a dispute over the efficacy of expert testimony and jury evaluation of disputed claims (Resp'ts Br., p. 11) is misplaced and is merely an attempt to divert. The basic propositions of maritime law here involved have been discussed fully in petitioner's main brief, and the hard fact is that respondent has been totally unable to meet that discussion and the many authorities there cited.

The judicial dismissal below of petitioner's claim should be reversed and the action remanded to the District Court for a new trial.

Respectfully submitted,

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